

(1990) 05 CAL CK 0055

In the Calcutta High Court

Case No : Criminal Appeal No. 14 and Criminal Revision No. 140 of 1986

The State

APPELLANT

Vs

Sunil Biswas and Others

RESPONDENT

Date of Decision : 14-05-1990

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 378(1), 386
Evidence Act, 1872 — Section 32(1)
Explosives Act, 1884 — Section 6(3)
Penal Code, 1860 (IPC) — Section 302, 304, 307, 326, 34

Citation : (1990) CriLJ 2093

Hon'ble Judges : M.N. Roy, J;Ajit K. Sengupta, J

Bench : Division Bench

Advocate : S.K. Mukherjee and S. Roy, for the Appellant;Balai Roy, Y. Dastoor and Chaitannya Mukherji, for the Respondent

Judgement

Ajit K. Sengupta, J.—This appeal has been preferred by the State of West Bengal represented by the Public Prosecutor, High Court, Calcutta u/s 378(1) of the Code of Criminal Procedure against the order dated 20th August, 1985 passed by the learned Additional Sessions Judge, 3rd Court, Howrah acquitting the accused/respondents who are police officials of different ranks of the charge u/s 302/34 Penal Code.

2. This case demonstrates the extent of inhuman torture and degrading treatment meted to a prisoner in police lock-up resulting in his illegal or extra-judicial execution.

3. The de facto complainant Sailendra Nath Thakur, father of the deceased had filed a revisional application against the order of acquittal. The appeal and the revision have been heard together and this judgment will govern both.

4. Briefly stated, the prosecution case was as follows:--

At the material time respondent No. 1 Sunil Biswas, Inspector of Police in charge

of Golabari Police Station and respondent No. 2 Sushil Dey was Sub-Inspector of Police attached to the said Police Station. Respondent No. 3 Bimalendu Dikshit and respondent No. 4 Dilip Kumar Biswas were both constables attached to the Golabari Police Station.

5. Kamal Thakur (the deceased), son of P.W. 1 Sailendra Nath Thakur was a railway employee and resided at No. 216/6, Golmohor Avenue at the Railway Colony P.W. 1, a retired railway employee was the Secretary of an Organisation for prevention of Anti-Social Actives. He made complaints against the Police Personnel and local hooligans to different high officials viz., S.P., I.G. and Chief Minister etc. As a result, a strained relation developed between him and his deceased son Kamal on one side and the Police Personnel, wagon breakers, gamblers and other local anti-socials on the other.

6. On 26th February 1980 between 7-30 and 8 p.m., the deceased Kamal Thakur and his friends P.W. 4, Sadananda Lal, P.W. 5 Asim Tarafdar, P.W. 6 Nepu Biswas and P.W. 8 Gopal Dasgupta were gossiping near the residence of Kamal at No. 216/6, Golmohor Avenue. The 4 accused persons then came in a private car at Golmohor Avenue and arrested Kamal Thakur. After putting him under arrest the accused persons assaulted Kamal at Golmohor Avenue with lathi and wooden rod and also gave him fist blows. Kamal was bleeding from his nose. The accused persons forced him to enter into the private car and left for Golabari Police Station. PW 1 Sailon ran after the car and also reached Golabari Police Station. He found Kamal in the police lock-up who was assaulted by the accused persons and other police personnel. Blood was coming out ceaselessly from the nose of Kamal. PW. 1 Sailen questioned the right of the accused persons to assault his son and demanded that he might be produced before the court if he was guilty of any offence. At this, accused Sushil Dey threatened to arrest him and put him in police lock-up. Not remaining content with the threat, Sushil gave several blows on his chest and then started assaulting Kamal Thakur with kicks on the abdomen and with blows and fists on other parts of the body. PW 1 then rushed to the residence of Shri P. K. Chakraborty, the then D.S.P., Howrah D.I.B., narrated the Incident to him and requested him to intervene in the matter and stop the assault of his son. Shri Chakraborty assured him that he would give necessary directions to the police officers over telephone and there was no cause of anxiety. Thereafter, Saileh returned to Golmohor Railway Quarters. PW. 2 Sk. Abdullah also saw Kamal in the police lock-up bleeding profusely from his nose and mouth. He also saw beating of Kamal with rods and pressing of burning cigarette ends on his body. PW 3 Bapi Ghosh who was arrested in connection with another case and was lodged in the lockup saw Kamal being hit with rods, fist blows and kicks. Burning cigarette ends were also pressed on his body and Kamal was writhing in pain. PW. 10 Baidyanath Chatterjee also went to the police station between 11.00 and 11.30 p.m. and found Karrial being beaten by the police and then hand-cuffed and placed inside the lock-up. PW 11 Bimal Sarkhel saw Kamal at Golabari Police Station lock-up till 9-40 or 10.00 p.m. At that time a person in civil dress came there, and directed police constables to bring out

Kamal Thakur out of the lock-up. After Kamal was brought out, the man in civil dress asked Kamal to hand over the revolver. He rose up from his chair and pressed the neck of Kamal with both hands and threatened to kill him.

7. PW 1 did not get any further information of his son Kamal on that night. Next morning at about 6.00 a.m. he went to the police station and found a police officer sitting in front of the door of the police station. He also found his son lying on his back in the police lock-up. Sailen took a tooth powder with him and asked the police officer to give it to his son. The police officer angrily ordered him not to disturb Kamal who was sleeping. One of the under-trial prisoners informed him that his son had been severely assaulted. He went back to railway quarter.

8. PW 1 Sailen again sent to the police station at 8.30 a.m. and met PW 2 Abdullah at the gate of the police station. Abdullah informed him that his son was very restless and he requested Abdullah to give him some tablets. But he was not allowed by the police to give those tablets. Sailen then went to the police lock-up and found his son in a sitting posture with his legs stretched in front and his head kept against the fencing. He touched the body of his son and found that it was cold. His son Kamal was then taken to Howrah General Hospital by a police van. He also followed, reached the hospital and found his son lying dead in a stretcher. The dead-body of his son was removed by a constable to the morgue.

9. From hospital Sailen went to Golabari Police Station to lodge First Information Report but he was not allowed by the police to enter into the police station and lodge a complaint. Sailen then made a petition of complaint (Ext. 5) in the Court of the Sub-Divisional Judicial Magistrate, Howrah on the same date. The learned Sub-Divisional Judicial Magistrate examined several witnesses on different dates and committed the case to the Court of Sessions.

10. All the accused persons, pleaded innocence denying the alleged assaults on the deceased. Accused Sunil Biswas took a plea of alibi alleging that on 26th February 1980 at the time of the incident he had been to Dolgobinda Singh Lane within Golabari Police Station on receipt of information of a stabbing incident. He had also been to Malipanchghora and Golabari P.S. area to hold a joint raid at Bandhaghat and after several raids at different places he came back home at about 12.30 a.m. and on 27th February 1980 at. about 8.30 a.m. he along with A.S.P. Town (North), I.C. Malipanchghora P.S. and with force of 9th Battalion went to Banaras Road and Sitanath Bose Lane on a special raid and was falsely implicated by Bapi Ghosh who had been arrested by him on 26th February, 1980 at about 10.30 p.m.

11. The case of the accused Sushil Dey and Dilip Biswas was that while returning to the police station at about 9.00/9.30 p.m. on 26th February, 1980 after a raid some shop keepers and local men informed them that accused Kamal Thakur with his gang had raided shops in front of Golmohor Avenue and Dobson Road. They and others at once rushed there but seeing the police party Kamal retreated and took shelter in a four storeyed building inside the Golmohor

Housing Complex. The police party reached the roof and found that Kamal was hanging holding the cornice. When the police focussed a torch light on him he jumped and fell on the roof below. He had a dagger with him. The police party succeeded in arresting him after a scuffle and at about 11.00 or 11.30 p.m. the police party came to the police station. Kamal sustained injuries by fall on the roof and in the scuffle with police personnel. Kamal refused to go to hospital for treatment of his injuries and first aid was given in the police station.

12. Accused Bimalendu Dikshit took up a plea of alibi. His case was that on and from 19th February, 1980 he was on casual leave for a week and went to village Krishnanagar in Midnapur District where he stayed for 7 days and after extending his leave for one day more he came back on 28-2-80 to his place of work and he did not know anything about the occurrence.

13. In order to bring home the charge u/s 302/34, Indian Penal Code to the accused persons the complainant examined 16 witnesses while the defence examined 11.

14. Upon a consideration of the evidence on record the learned Additional Sessions Judge accepted the prosecution case that the deceased was mercilessly assaulted and he died of the injuries caused by such assaults and rejected the defence version that the injuries leading to the death of the deceased were caused by a fall from the roof but he was of the opinion that the prosecution could not prove by unimpeachable evidence beyond reasonable doubt that any of the accused persons took part in the assault. He accordingly acquitted all the accused persons of the charge u/s 302/34, Penal Code.

15. Before proceeding to consider the evidence and see for ourselves whether the order of acquittal can be sustained, we may bear in mind the scope of appeal against the order of acquittal. Supreme Court in *Jadunath Singh and Others etc. Vs. State of Uttar Pradesh*, has reiterated that in an appeal against acquittal the High Court has full power to review at large all the evidence and to reach the conclusion that upon that evidence the order of acquittal should be reversed. This power of the appellate court in an appeal against acquittal was framed by the Judicial Committee of the Privy Council, in *Sheo Swarup and Others vs. King Emperor* and AIR 1945 151 (Privy Council) These two decisions have been consistently referred to by the Supreme Court which afford a correct guide for the Appellate Court's approach to the case in disposing of an appeal against acquittal and the different phraseology used in the judgments of the Supreme Court, such as (i) "substantial and compelling reasons"; (ii) "good and sufficiently cogent reasons"; and (iii) "strong reasons" are not intended to curtail the undoubted power of an Appellate Court in an appeal against the acquittal to review the entire evidence and to come to its conclusion; but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not

justified. (See Surajpal Singh and Others Vs. The State, , Ajmer Singh Vs. The State of Punjab, and Aher Raja Khima Vs. The State of Saurashtra,

16. In emphasising the necessity of "compelling reasons" to justify an interference with an order of acquittal, the Supreme Court did not in any way try to curtail the power of the Appellate Court u/s 386 when hearing the appeals against acquittal. What may be called the golden thread running through all the decisions of the Supreme Court is the rule that in deciding appeals against acquittal the court of appeal must examine the evidence with particular care, must also examine the reasons on which the order of acquittal was based and should interfere with the order only when satisfied that the view taken by the acquitting Judge is clearly unreasonable. Once the Appellate Court comes to the conclusion that the view taken by the Lower Court is clearly an unreasonable one, that itself is a "compelling reason" for interference. For, it is a Court's duty to convict a guilty person when the guilt is established beyond reasonable doubt, no less than it is its duty to acquit the accused when such guilt is not so established.

17. There is no dispute before us that Kamal Thakur died of injuries sustained by him. The evidence of PW 15 Dr. Subrata Ghosh shows that Kamal was brought by police to the Howrah General Hospital on 27th February 1980 at 9.30 a.m. and PW 15 examined him and found him to be dead. The injury report was not, however, traceable. PW 7 Dr. B. K. Mukherjee held post-mortem examination on the dead body of Kamal Thakur at 4.30 p.m. on 27th February, 1980 and found sub-conjunctival haemorrhage present in both eyes, six abrasions 1/2" x 1/2" each, and ecchymosis on the right knee, ecchymosis 3" on the lower part of left thigh, 4 abrasions and ecchymosis in the left elbow and ecchymosis of the lower portion of the left arm with diffusion of blood underneath. There were also abrasions, ecchymosis on the right buttock and on the left angle of jaw, right face and right side of forehead with signs of inflammation around the injuries. On dissection the 3rd and 4th ribs of the left side were found fractured and the right lung congested. The liver and the right kidney were also found ruptured and the left kidney congested. In the opinion of the doctor, death was due to the combined effects of the injuries which were ante-mortem and homicidal in nature. According to the doctor, the external injuries could be caused with wooden rules or lathi and also with kicks with force. The fracture of ribs can be caused if one is hit by hard and blunt substance with force like lathi, iron rods or wooden rules. Liver and kidney may be ruptured by violent kicks. According to the doctor one may vomit blood if one lung is injured by the fracture of ribs. The doctor is emphatic that all the injuries both external and internal taken together are homicidal and not accidental due to a fall. The defence case was that the injuries resulting in death of the deceased were due to accidental fall of the deceased who was hanging from a cornice on the roof below is falsified by the medical evidence. The learned Additional Sessions Judge also accepted the prosecution case that the deceased was mercilessly beaten while in custody of police at the Thana and died as a result of the injuries sustained by him and that

the injuries were not due to fall from the roof as contended by the defence. There is no dispute that the deceased was arrested and kept in the lock-up of the Golabari Police Station on the night of 26th February, 1980 and the next morning he was found dead. The deceased did not receive any medical attention before his death while in custody of police. The circumstances clearly prove that the deceased was mercilessly beaten at the police station and at the lock-up and was victim of a brutal third degree method resorted to for the purpose of extorting a confession or a statement regarding a weapon. At least the police personnel who arrested the deceased and brought him to the police station and kept him in the lock-up cannot easily escape responsibility. There is no dispute that at least S.I. Sushil Dey and constable Dilip Kumar Biswas were among the police party who arrested the deceased, though there is dispute with regard to the time and the manner of the arrest. It is generally difficult in cases of deaths in police custody to secure evidence against the police men responsible for resorting to third degree methods since they are in charge of police station records which they do not find difficult to manipulate. It is only in a few cases, as in this case, that some direct evidence is available. There is direct evidence of assault by the four accused persons. The learned Additional Sessions Judge discarded the entire evidence of the eye-witnesses on the ground of minor discrepancies, exaggerations and infirmity or falsity of a part of the testimony forgetting that *falsus uno falsus omnibus* is not a sound principle of law or practice. It is the duty of the court to separate grains from the chaff. It appears that the learned Additional Sessions Judge has failed in such a duty and has not properly shifted the evidence and rejected the entire evidence on insufficient grounds. Upon a careful consideration of the entire evidence on record and the facts and circumstances of the case we have no doubt that the prosecution has been able to prove satisfactorily that accused Sunil Biswas, Sushil Dey and Dilip Kumar Biswas were responsible for the death of the deceased, though the evidence against accused Bimalendu Dikshit is not satisfactory and his plea of alibi has been established by cogent evidence.

18. The witnesses to the first part of the prosecution story regarding arrest of the deceased are PWs 1, 4, 5, 6 and 8. Of them PW 6 Nepu Biswas was declared hostile and cross-examined by the prosecution. His evidence was totally discredited by his earlier initial deposition before the learned Sub-Divisional Judicial Magistrate. We may, therefore, leave his testimony entirely out of our consideration. PWs 1, 4, 5 and 8 all have deposed in one voice that on 26-2-80 between 7.00 and 7.30 p.m. the witnesses and the deceased Kamal were gossiping on a cemented platform in front of the house of PW 1 and the deceased when a police party headed by the Officer-in-Charge, Golabari Police Station came there in a private car and arrested Kamal in spite of their protests and assaulted him with fists, blows and wooden rods as a result of which Kamal started bleeding from his nose and forced him to enter into the car and went away to Golabari Police Station. PW 1 Sailendranath Thakur, father of the deceased Kamal Thakur named all the four accused persons as members of the

police party. PW 4 Sadananda Lal identified all the accused persons as members of the police party. He also spoke about the assault resulting in nose-bleeding. P. W. 5 Asim Tarafdar implicated all the four accused persons. In his initial deposition before the learned Sub-Divisional Magistrates he did not mention the names of Bimalendu Dikshit and Dilip Kumar Biswas. So his present testimony implicating Bimalendu Dikshit and Dilip Kumar Biswas cannot be accepted. But his testimony regarding accused Sunil Biswas and Sushil Dey does not suffer from any such infirmity, and there is no reason why it should not be accepted. The learned Additional Sessions Judge was wrong in discarding the entire evidence of PW 5 when a part of his testimony only regarding accused Bimalendu Dikshit and Dilip Kumar Biswas was contradicted by his earlier deposition before the learned Sub-Divisional Judicial Magistrate. PW 8 implicates accused Sunil Biswas only who was the Officer-in-Charge of Golabari Police Station at the relevant time. PW 4 has, however, stated that Kamal's father came immediately after they had informed him about the fact of assault. Relying upon this statement, the learned Additional Sessions Judge has held that PW 1 was not present at the time of the occurrence at all and his testimony implicating the accused persons cannot be accepted. The statement of PW 4 does not necessarily show that P.W.1 could not see the last part of the incident. The evidence discloses that the occurrence lasted for about 10 minutes. Kamal was arrested just in front of his house where his father P.W. 1 was also residing. It was, therefore, quite possible for P.W. 1 to come to the place of occurrence on receipt of information of arrival of police and see the later part of the occurrence when Kamal was forcibly dragged to the car and taken away to the police station while assaulting him all the time. The evidence of P.W.1 does not otherwise suffer from any infirmity and in our opinion there is no justification to discard his testimony altogether. He has not, however, implicated accused Bimal Rakshit in his initial deposition before the committing Magistrate and his present testimony so far as it implicates him must, therefore, be rejected.

19. There is no dispute that appellants Sushil Dey and Dilip Biswas were among the police party who arrested deceased Kamal in the evening of 26th February 1980 from Golmohor Avenue though there is dispute with regard to the time and manner of the arrest. The version of appellants Sushil and Dilip Biswas is that while they were returning to the Police Station at about 9.30 p.m. on 16-2-80 after a raid, some shop-keepers and local men informed them that accused Kamal Thakur with his gang had raided shops in front of Golmohor Avenue and Dobson Road. On receipt of this information they along with other police officers at once rushed there but seeing the police party Kamal retreated and took shelter inside the Golmohar Housing Complex and the police party found him hanging from a cornice. Seeing the police party Kamal jumped and fell on the roof below. He had a dagger with him. The police party succeeded in arresting him after a scuffle and at about 11.00 or 11.30 p.m., the police party came to the police station. Kamal sustained injuries by fall on the roof and in the scuffle with police personnel. Kamal refused to go to hospital for treatment of his

injuries and first aid was given in the police station. This version of appellants Sushil and Dilip is falsified by the evidence of PWs which has been discussed above. There are also inherent improbabilities in the story. The defence relies upon G.D. Entry No. 2481 dated 26-2-80 at 11.35 p.m. (Ext. 46). The said G.D. entry was made by accused Sushil Dey. The first paragraph of the said entry is to the effect that the deceased Kamal Thakur was brought to the police station under arrest in connection with P.S. Case No. 15(2)/80 u/s 326/ 307, Penal Code and Section 6(3) Indian Explosives Act. The next paragraph of the G.D. entry, however, gives minute details about the mode of apprehension of Kamal Thakur which appears to be quite unnecessary and improbable. The story that some shop-keepers reported to the police party while they were returning to the police station at 9.30 p.m. that deceased Kamal Thakur along with his associates armed with bombs and daggers threatened them with dire consequences for deposing against him and Nema Roy appears to be quite improbable. There is no First Information Report or diary lodged by any of the alleged shop-keepers. It is improbable that instead of going to the police station to lodge information they would wait on the road with the hope of accidentally meeting the police party. According to G.D. entry, on receipt of this information the police party went near the railway quarters at Golmohor Avenue and arrested Kamal Thakur who took shelter inside a building. This part of the story in the G.D. is inconsistent with the first part that Kamal Thakur was arrested as he was wanted in connection with Golabari P.S. Case No. 15(2)/80 u/s 326/307 Penal Code and Section 6(3), Explosives Act. Shops are not likely to remain open till 9.30 p.m. and the story of information by the shopkeepers at 9.30 p.m. is highly improbable. The story that Kamal Thakur who was hanging from a cornice fell down on the roof of another building below on seeing the police party and thereby sustained injuries which ultimately caused his death is falsified by the medical evidence. We have already seen that the injuries sustained by the deceased could not be caused by the alleged fall and these were homicidal in nature. The further story that a knife was seized from the possession of Kamal Thakur cannot be accepted in the absence of any seizure list. The story that the accused was found in an intoxicated manner who was smelling of liquor is also belied by medical evidence. The Autopsy Surgeon did not find any alcohol in the stomach of the deceased. The story that in spite of repeated requests by the police the deceased declined to be medically examined and treated at the hospital sounds to be quite improbable and the story appears to have been invented with the idea of explaining a serious lapse on the part of the police for not arranging medical examination of the deceased. There is a curious statement in the G.D. entry that the deceased did not complain of any ill-treatment by anybody. The G.D. Entry un-mistakably reveals considerable anxiety on the part of the police to suppress the fact that the deceased was mercilessly assaulted by the police after his arrest which ultimately led to his death. The story that the deceased was arrested and brought to the police station between 9.30 p.m. and 11.35 P.M. also appears to be improbable.

20. In support of the plea of alibi raised by accused appellant Sunil Biswas who was then in charge of the Golabari Police Station, the defence has examined DW 1 Ranjit Kumar Roy and personal diary of Shri Biswas (Ext. E series). DW 1 Ranjit Kumar Roy was Inspector of Police attached to Malipanchaghora Police Station on 26th February, 1980. He has deposed that he and Inspector Sunil Kumar Biswas held joint raid under the supervision of A.S.P., Howrah at Bandhaghat and other places from 8-30 p.m. to 12-30 mid-night. On 27th February, 1980 they again held raid at Salkia Benaras Road from 6.00 a.m. to 11.00 a.m. DW 1 had not produced his personal diary and has deposed from memory. His evidence is, therefore, hardly convincing. According to the entry made by Shri Biswas in his personal diary (Ext. E/2), he left for Bandaghat area for holding raid at 8.15 p.m. and as per Ext. E3 he returned to the police station to 00.35 hour. These entries, even if true, do not support the plea of alibi. The deceased was arrested and brought to the police station between 7.00 and 7.30 p.m. and not between 9.30 p.m. and 11.35 p.m. as alleged by the defence. Appellant Sunil Biswas before departure at 8.15 p.m. could, therefore, very well arrest the deceased and bring him to the police station and participate in the assault.

21. The above discussion will clearly show that the prosecution has been able to satisfactorily prove that appellants Sunil Biswas, Sushil Dey and Dilip Kumar Biswas along with others arrested the deceased on 26th February, 1980 between 7.00 and 7.30 p.m. near the railway quarters at Golmohor Avenue and caused bleeding injuries to the deceased by fists and blows.

22. Let us consider the next part of the prosecution story, namely, the alleged merciless beating of the deceased at the police station. The witnesses to this part of the prosecution story are P.W. 1 Sailendranath Thakur, P.W.2 Sk. Abadullah, PW 3 Bapi Ghosh, PW 10 Baidyanath Chatterjee and P.W. 11 Bimal Sarkhel.

23. P.W. 1 Sailen states that after the accused persons took the victim in the car and started for the police station he ran after it and reached the Golabari Police Station. He found Kamal in the police lock-up being abused by the accused and other police personnel. The accused persons were assaulting him and blood was coming out ceaselessly from his nose. The witness questioned the right of the accused persons to assault his son and he demanded that the victim might be produced before Court if he was guilty of any offence. At this, appellant Sushil Dey threatened to arrest him and put him in police lockup, gave several fist blows on his chest and then started assaulting Kamal with kicks and fist blows. Kamal began to cry for help. The further evidence of PW 1 is that he then rushed to the residence of P. K. Chakraborty the S.D.P.O., Howrah (D.I.B.) and reported the incident to him and requested him to intervene in the matter and stop the assault. As Shri Chakraborty assured him that he would give the necessary directions over the telephone and there was no cause for anxiety, the witness returned home. Next day (27-2-80) at 6.00 a.m. he went to the police station and found a police officer sitting in front of the door of the police station and found his son lying on his back in police lock-up. He took tooth-powder with him

and asked the Police Officer to give it to his son. He asked the A.S.I. who was sitting in front of the police lock-up about the time when his son would be produced before Court. The police officer angrily said "Don't disturb him, he is sleeping". He went back home and again returned to the police station at 8.30 a.m. At the gate he met PW 2 Sk. Abdullah. On receipt of an information from him that his son was very restless at one time, he went close to the lock-up and found his son in a sitting posture with his legs stretched in front and his head resting on the fencing and hands touching the rods of the fencing. He touched the body of his son which was cold. His son was taken to Howrah General Hospital in a Police van. He also went to the hospital and found his son lying dead on a stretcher in the Emergency Ward.

24. The learned Additional Sessions Judge has discarded the evidence of P.W. 1 altogether mainly on the ground that no other witness speaks of his presence at the police station. He has further held that in the absence of examination of Shri P. K. Chakraborty, the story of P.W. 1 that he went to him and informed him about the torture of his son by the police cannot be accepted. In our opinion, these are not sufficient reasons for discarding the evidence of P.W. 1 altogether. There is no serious infirmity in his evidence. The complaint was lodged promptly and there is no departure in his evidence on any material particular. The only blemish in his evidence is that though he has implicated appellant Bimalendu Dikshit in his initial deposition he did not mention his name. It appears from his evidence that he left the thana and went to Shri Chakraborty to inform him about the matter and returned home as a superior police officer assured him that he would do the needful and there was no cause for anxiety. It was quite natural for PW 1 to get assured and return home. That explains the fact that he did not take any further step on that night. The evidence of P.W. 10 and P.W. 11 shows that they went to the police station much later and it is no wonder that they did not see P.W. 1 in the police station. The story of P.W. 1 that on 27-2-80 after 6.00 a.m. he went to the police station with tooth powder for his son and enquired of the Duty Officer as to when his son would be forwarded to the Court, though challenged in the cross-examination, is corroborated by the G. D. Entry No. 2490 made at 6.15 a.m. (Ext. A/10).

25. The testimony of PW 2 Sk. Abdullah is that he saw Kamal Thakur bleeding profusely from his nose and mouth in the police lock-up in the morning of 27-2-80. He saw marks of hitting with rods and burning by cigarette ends on the person of Kamal who expired at about 7.30 a.m. When he first saw Kamal in the lock-up, he was in a sitting posture and was restless. He asked the police to send Kamal to the hospital but police did not send him to the hospital in spite of his request. The further testimony of the witness is that Kamal told him crying that police assaulted him. The testimony of this witness shows that there were marks of injuries on the person of Kamal who was writhing in pain and made statement that he was assaulted by police. The learned Additional Sessions Judge is of the opinion that this statement of the deceased cannot be regarded as a dying declaration that points to the immediate cause of his death. He has observed as

follows:

"now the utterance made by the deceased Karnal in my humble opinion cannot be said to be a dying declaration that points to the immediate cause of his death." The learned Judge appears to be entirely wrong. The statement of the deceased is with regard to the cause of his death made shortly before his death. It is therefore clearly admissible as dying declaration of the deceased u/s 32(1) of the Evidence Act. This dying declaration which is also corroborated by independent evidence shows that the deceased was mercilessly beaten at the Golabari Police Station. The deceased did not, however, specifically mention the names of the police officers.

The evidence of P.W 3 Bapi Ghosh is very important. There is no dispute that Bapi Ghosh was arrested in the evening of 26-2-80 and kept in the police lock-up of Golabari Police Station. According to the defence he was arrested and brought to the police station at about 11.00 p.m. but it has been elicited from his cross-examination that he was arrested at 5.30 p.m. The testimony of PW 3 is that Kamal was brought at 7.30 p.m. by Sunil Biswas and Dilip Dey. He was then assaulted after being tied. Sunil and Dilip beat him with lathi and also gave fist blows and kicks. Burning cigarette ends were also pressed against his body. At that time Kamal was writhing in pain. He asked for medicine but no medicine was given. He was then placed in the lock-up. Again at night he was brought out and assaulted. Kamal vomited blood. Then Dilip Biswas and Bimal Dey kicked on his abdomen. Sunil Biswas and Sunil Dey assaulted him with rules. Next morning at 7.30 a.m. Kamal Thakur expired at police lock-up. At that time his hands were placed on the bars of the lock-up.

26. In the cross-examination the witness has stated that the beating of Kamal Thakur continued for 1 1/2 to 2 hours at Golabari Police Station outside the lock-up. After 10.30 and 11.00 a.m. again beating commenced. Except that he was not assaulted at any other time. The witness, however, states that from 10.30 p.m. the beating continued to 5.00 a.m. on the next day and there was no respite and (beating?) was made with blows, fists, rules and lathi. Though P.W.3 has implicated all the four accused/appellants, in his initial deposition before the learned Magistrate, he did not implicate appellants Sushil Dey and Bimalendu Dikshit. This part of his testimony implicating appellants Sushil Dey and Bimalendu Dikshit must, therefore, be rejected but with regard to the incident of assault by the Police personnel and participation of appellants Sunil Biswas and Dilip Kumar Biswas his testimony does not suffer from any serious infirmity except some exaggerations and minor discrepancies here and there which may be safely overlooked. His statement in the cross-examination that from 10.30 p.m. the beating continued to 5.00 a.m. on the next day and there was no respite and during the entire period the deceased was assaulted with blows of fists, rules and lathi certainly contains some exaggeration and it need not be taken too literally. What the witness really intends to state is that the deceased was beaten several times during that night. The learned Additional Sessions

Judge disbelieved P. W. 3 who is a natural and competent witness, mainly on two grounds. Firstly, the medical evidence indicates that there was no injury on the testicles and burn injuries and as such the testimony of the witness regarding the alleged kick on the testicles and pressing burning cigarette ends against the body of the deceased must be discarded as incredible. Secondly, this witness swore an affidavit (Ext. 1) on 26th August, 1980 stating therein that he was arrested without any reason on 26th February, 1980 from near his house and was put in Hazat by Thana Duty Officer but as the O.C. did not come back to the Police Station and was not available either on night or in the following morning he could not ventilate his grievance to the O.C. At about 11.30 p.m. Kamal was arrested and put inside Hazat by Sushil and Dilip. First aid was rendered to Kamal who expressed his unwillingness to go to hospital. It was further stated in the affidavit that Kamal was a local rowdy and was arrested several times by the police party. He has, further stated in the affidavit supporting the present defence case that Kamal was jumping from the roof in order to escape and sustained the injuries as a result of a fall. The witness has stated in his evidence that the accused persons took him to the Court of the Metropolitan Magistrate and asked him to swear the affidavit and he accordingly swore the affidavit out of fear. The learned Judge has observed "so it is rather risky to rely upon the deposition of a fickle minded and a timid boy like this witness who swings from one side to another and takes resort to exaggeration". In our opinion, the learned Judge was not justified in discarding the evidence of PW 3 altogether on the above ground. The victim was not naked and the witness could not exactly see if the kick was on the testicles. The kick was obviously in the abdomen and it appeared to the witness that it might be on the testicles. This part of his testimony was clearly an unconscious inference and no importance may be attached to it. Other witnesses have also spoken about pressing of burning cigarette ends against different parts of the body of the deceased, which is a well known third degree method. It is true that the medical evidence does not specifically show the injuries which might be caused by pressing burning cigarette ends against the body. The postmortem was held long after the injuries. Marks of such injuries like blisters might disappear at the time when the post-mortem examination was held. It is significant that neither the injury report prepared by P.W. 15 Dr. Subrata Ghosh on examination of Kamal Thakur at the Howrah General Hospital where he was brought dead at 9.30 a.m. on 27-2-80 nor the inquest report is traceable. The possibility of deliberately causing disappearance of the same in order to suppress the burn injuries which would unmistakably demolish the defence version and establish the version of police torture cannot be ruled out. It may be mentioned here that the testimony of P.W. 3 with regard to other assaults is fully corroborated by the medical evidence. The testimony of the eye-witness ought not have been discarded simply because at the time of autopsy which was held long after, the injuries likely to be caused by pressing of burning cigarette ends on the body of the deceased were not found. With regard to the second ground for rejection of the testimony of P.W. 3, the learned Additional Sessions Judge has apparently forgotten that an ordinary

witness like P.W. 3 was deposing against mighty police officers. He has also failed to notice that the affidavit sworn by the witness is entirely uncalled for and was obviously intended to destroy the effect of his testimony before the Magistrate and the subsequent testimony, if any, to be given at the time of trial. The affidavit curiously states the defence version of the occurrence. There is absolutely no reason to disbelieve the statement of P.W. 3 that he was made to swear the affidavit at the dictation of the accused persons out of fear. Credit must be given to the witness that ultimately he got rid of fear of police and deposed against the police officers. Considering all the facts and circumstances we are of the opinion that the learned Additional Sessions Judge was entirely wrong in discarding the evidence of P.W. 3 altogether. The confusion about the surnames of some of the accused persons is not of much consequence. P.W. 3 was arrested for commission of a petty offence and he was released by the Court next day. Undisputedly, he was the most natural witness to the occurrence. The learned Additional Sessions Judge has himself found that the injuries were not due to accidental fall but were due to the merciless beating by police. There is also the significant circumstance that police did not make any arrangement for medical examination of the deceased and it was only after his death or just prior to his death that he was removed to the hospital. Considering all the circumstances, we have no hesitation in accepting the testimony of P.W. 3 at least with regard to accused Sunil Biswas and Dilip Kumar Biswas.

27. P.W. 10 Baidyanath Chatterjee has deposed that on 26-2-80, on receipt of information from PW 1 Sailen Thakur he went to the police station at about 11.00 or 11.30 p.m. and saw Kamal Thakur handcuffed inside the lock-up being beaten by the police. He saw blood trickling down his body. Police was beating him with wooden lathi. In the cross-examination, he has stated that he saw the police personnel dragging Kamal, slapping him and pushing him with wooden lathi. Barababu came in plain dress. In his examination-in-Chief he has deposed that he asked Barababu of the Police Station not to beat Kamal Thakur any further. Barababu assured him and advised him to disperse. Up to this stage he has supported the prosecution case and corroborated the testimony of PWs 1 and 3. He has, however, stated that he does not remember the persons who assaulted Kamal. He has further stated that those persons who assaulted him were not in the Court. He was declared hostile and was cross-examined by the prosecution on this part of his testimony only. He was controverted with his statement in his initial deposition before the committing Magistrate that O. C. S. Biswas, S.I. Sushil Dey Constable Dilip and others were among the police party and that he requested S. Biswas, O.C. not to assault him further as he might die. It is quite obvious that he is not implicating Sunil Biswas, Sushil Dey and Dilip Biswas either out of fear or out of some ulterior motive. It may be mentioned here that in spite of his efforts not to implicate any of the accused persons he unwillingly and indirectly implicated Sunil Biswas who was then Officer-in-Charge of Golabari Police Station. The Officer-in-Charge of a Police Station is usually called "Barababu". Admittedly, Inspector Sunil Biswas was in charge of Golabari Police

Station at the relevant time.

28. The testimony of P.W. 11 Bimal Sarkhel, an Advocate's Clerk is that on 26-2-80 he saw Kamal Thakur at Golabari Police lock-up between 9.40 and 10.00 p.m. At that time a person in civil dress came there, the duty officers and constable stood up and saluted him and then took their seats and informed him that they had arrested Kamal Thakur. The man in civil dress directed the police constable etc. to bring him out. That person in civil dress asked Kamal Thakur to handover the revolver. He was declared hostile and contradicted with reference to his previous statement made before the committal court that O.C., Golabari P.S. whom he knows came inside the office and ordered the lock-up duty constable to bring out Kamal by saying "Kamalke ber kar" and that O.C. then sat on a chair with lathi in his right hand and burning cigarette in his left hand and that O.C. then rose up from chair and throttled the neck of Kamal with both his hands saying "Sala Toke mere felbo". Like P.W. 10, P.W. 11 also has tried to save the accused persons particularly Sunil Biswas though he has supported the prosecution story that Kamal was assaulted by Police Officers. He has stated that Kamal cried "Amake Bachan Amake Ebabe Marben Na" (Save me, please do not assault me in such a manner). During his cross-examination by the prosecution the witness has stated that immediately thereafter, O.C. started beating him with lathi on both hands, back and other parts of the body. This is his substantive piece of evidence. As stated earlier, appellant S. K. Biswas was the Officer-in-Charge at the material time and the statement really implicates him but the witness in his anxiety to save the accused persons including S. K. Biswas has stated that those who assaulted Kamal on that day were not present in Court. In cross-examination, the witness has stated that he saw the assault of Kamal Thakur for a period of 5 minutes. He saw a constable hitting the shoulder of Kamal with his elbow.

29. According to the defence, deceased Kamal Thakur was a notorious anti-social who was wanted in connection with several cases. Even if true, this does not give a right to the police to liquidate him while he was in their custody. The third degree method that was employed by the police has no sanction of law. It would indeed be an end of democracy and rule of law if police is allowed to act as Prosecutor, Judge and Executioner at the same time.

30. Let us next consider the plea of alibi of appellant Bimalendu Dikshit. We have already seen that the evidence against him is scanty; his name was not mentioned by any of the witnesses in their initial depositions before the learned Magistrate and the present testimony implicating him cannot be relied on. The testimony of DW 7 Amal Kumar Bhattacharjee, the then traffic Habildar attached to Tandel Bagan Out Post has stated that appellant Bimalendu Dikshit was also posted at Tandel Bagan Out Post at the relevant time. A general diary was maintained and duty roster was also maintained. DW 7 proves the G.D. entry No. 484 dated 19th February, 1980 written in his own hand (Ext. A/11) which shows that appellant Bimalendu Dikshit was allowed casual leave for 7 days from

19-2-80 vide D.O. No. 15 dated 18-2-80. G.D. entry No. 694 dated 28th February, 1980 marked Ext. A/12 shows that he reported for duty on 28-2-80 at 8.35 a.m. after extending casual leave by 1 day. The relevant entries in duty roster (Exts. "G" and "G1") also show that appellant Bimalendu Dikshit was on casual leave for 7 days from 19-2-80 and he reported for duty on 28-2-80. PW 8 Benode Behari Prodhan is a resident of village Krishnanagar, Police Station Nandigram, District Midnapur. Appellant Bimal Dikshit also belongs to the same village and his house is at a distance of 100 yards from that of the witness. The evidence of PW 8 shows that Bimal's father-in-law Mrityunjoy Mahapatra, family Priest of the witness, lives in village Anandabati which is only one mile away from Nandigram. The testimony of the witness goes to show that the sacred thread ceremony of Ashit Kumar Mahapatra, youngest son of Mrityunjoy Mahapatra, was held on 27-2-80 and the witness attended that ceremony. He was there from the noon of 26-2-80 to afternoon of 27-2-80 and he saw appellant Bimal Dikshit there all through. He also saw Bimal Dikshit in the village 6/7 days before the ceremony. There is nothing in the cross-examination which impeaches the credibility of this witness. The testimony of this witness together with the relevant entries in the official records which were not made by this appellant, leave no doubt that at the time of the occurrence Bimal was at his father-in-law's house at Midnapur where he had gone to attend the sacred thread ceremony of his youngest brother-in-law by taking casual leave for 7 days.

31. We have already seen that the plea of alibi of appellant Sunil Biswas has not been proved. Even if he left the police station on 26-2-80 at 8-15 p.m. that does not exclude the possibility of his arresting the deceased and assaulting him at the place of arrest and at the police station between 7.00 and 7-30 p.m. We have already considered the defence version of appellants Sushil Dey and Dilip Kumar Biswas and found the same as totally improbable. It was a device to suppress the fact of merciless assault by the police leading to the death of Kamal Thakur while in police custody and save the appellants.

32. In view of what has been stated, it must be held that the prosecution has been able to satisfactorily prove that appellants Sunil Biswas, Sushil Dey and Dilip Kumar Biswas were responsible for death of Kamal Thakur beyond any reasonable doubt and the order of acquittal passed by the Court below so far as these appellants are concerned is unreasonable and cannot be sustained.

33. The next question for our consideration : what offence was committed by these three appellants. They mercilessly assaulted deceased Kamal Thakur while in their custody after arrest in order to extort confession or recovery of a weapon. It is true that they did not intend to cause his death. P.W 7 has not stated in the examination-in-Chief that the injuries were sufficient in the ordinary course of nature to cause death. It, however, appears from the cross-examination that due to rupture of kidney and liver the patient is likely to die. Appellants Sunil Biswas, Sushil Dey and Dilip Biswas might not even intended rupture of liver and kidney etc. but they had knowledge that the kicks, fists and

lathi blows were likely to cause such injury as were likely to cause death. All of them acted with prior concert and shared common intention of assaulting the deceased for extorting confession which was likely to cause death. They were, therefore, liable to be convicted u/s 304 Part II/34 Indian Penal Code.

34. In the result, the appeal and the revision are allowed in Part. The order of acquittal of the respondents Sunil Biswas, Sushil Dey and Dilip Kumar Biswas is set aside. They are convicted u/s 304, Part II/34 Penal Code. The question is whether having regard to the passage of time and the changed circumstances we should be justified in sentencing them to imprisonment. Offence is of grave nature aggravated by the fact that it was committed by Police Officers who are supposed to protect citizens and were not to misuse their power and authority to torture the prisoner brutally while in their custody. Death in Police Custody must be seriously viewed and must be curbed with heavy hand. Punishment in such a case must be deterrent so as to prevent recurrence of such atrocious and brutal assaults on a defenseless prisoner in police custody. To show leniency in such a case would amount to approval to the establishment of a Police administration without responsibility, without accountability and without administrative morality. It would amount to denial of the right of existence of a citizen which shock the conscience of all. The deprivation of life by the authorities of the State is a matter of the utmost gravity. No civilized country governed by rule of law and committed to protect the human dignity and decency can permit such illegal or extrajudicial execution.

35. In the premises the respondents Sunil Biswas and Sushil Dey are sentenced to suffer Rigorous Imprisonment for seven years each and respondent Dilip Kumar Biswas is sentenced to suffer rigorous imprisonment for five years. Each of the respondents Sunil Biswas and Sushil Dey shall also pay a fine of Rs. 5000/- and Dilip Kumar Biswas shall pay a fine of Rs. 2500/- in default, each of them will suffer further rigorous imprisonment for one year. If the fine is realised the same shall be paid to the de facto complainant. The respondents Sunil Biswas, Sushil Dey and Dilip Kumar Biswas are directed to surrender forthwith to their respective bail bonds and serve out the sentence.

36. The order of acquittal of the respondents Bimalendu Dikshit is affirmed and he is discharged from his bail bond.